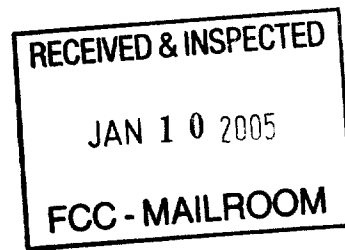


System: 165.135.210.45 sec fax,sec, 4181087 --- Time Printed: 01-10-2005 09:51:15

From: 9739161986
Media: Fax 6 pages
Subject:
Status:
Received: 08:53 AM 01/10/05



No. of Copies rec'd 0
List ABCDE

Letter of Appeal
Federal Communications Commission
Office of the Secretary
January 7, 2005
Page 6

under limited circumstances". *In re Atlantic City Public School District*, 17 FCC Rcd 25186, 25189 on December 16, 2002.

To make matters worse, this proceeding, in its essence, is an attempt to recover funds from ICM and, therefore, is an attempt to enforce a forfeiture of ICM's property. If any civil proceeding deserves the procedural safeguards of Due Process, it is a forfeiture proceeding. This Commission cannot expect a small business like ICM, which is being faced with financial ruin if it cannot reverse these commitment adjustments, to adequately defend its position when the USAC, on deciding its appeal, considers new evidence that ICM had no notice of or for that matter had any knowledge of whatsoever. Based upon this total lack of both substantive and procedural due process, this Commission must grant this Appeal, rescind the Commitment Adjustment Letter, and reinstate all commitment amounts in full.

C. The proposed commitment adjustments should be reversed on equitable grounds. ICM, which by the USAC's own admission, had nothing to do with any alleged improprieties in the competitive bidding process is being asked to bear the brunt of some other entity's alleged improper acts. If these proposed commitment adjustments remain as proposed, ICM will have rendered non-recoverable goods and services and have effectively received no compensation for its efforts which it rendered in accordance with its contractual commitments. On the other hand, an applicant who may have been a party to a improper competitive bidding procedure will have received goods and services and have incurred no costs for their acquisition. This would be a gross injustice where an innocent party is punished and a culpable party receives an undeserved benefit. This Commission has, in the past, reviewed the equities of various matters and when, as in this case, these equities weighed heavily in favor of an aggrieved party, this Commission waived the technical requirements of regulations to achieve a just outcome. *In re Shawnee Library System*, 17 FCC Rcd 11824, 11829 on January 25, 2002; *In re Folsom Cordova United School District*, 16 FCC Rcd 20215, 20220 on November 13, 2001. In order to avoid an unwarranted hardship to ICM and to achieve a just result, the Commission should issue a waiver with respect to the FRNs in issue and the competitive bid rules. On the equity considerations alone, the commitment adjustment results should be cancelled and all FRNs reinstated in full.

2. Subsequent to the filing of ICM's Appeal on May 12, 2004, but prior to the Administrator's Decision on Appeal issued on November 16, 2004, the Federal Communication Commission ("FCC") adopted *In re Federal-State Joint Board on Universal Service*, 19 FCC Rcd 15252 on July 23, 2004 [hereinafter *In re Federal-State*]. A copy of that decision is annexed hereto as Enclosure 3.

This decision, issued by the FCC in response to petitions by various providers, directed the USAC to re-direct its efforts to recover any funds that had been allegedly distributed unlawfully from the providers to the party or parties who have committed the statutory or rule violation in question.



INDEPENDENT COMPUTER MAINTENANCE LLC

SALES • COMMUNICATIONS • CONSULTING • VOICE & DATA SOLUTIONS

www.icmcorporation.com

FAX COVER SHEET

FAX NUMBER: (202) 418-0187

TO: Federal Communications Commission
Office of the Secretary

FROM: Anthony Natoli, President
Independent Computer Maintenance, LLC

DATE: January 7, 2005

RE: Letter of Appeal – Dar Al-Hikmah Elementary School

NUMBER OF PAGES INCLUDING COVER: 64 pages to follow

RECEIVED & INSPECTED

JAN 10 2005

FCC - MAILROOM

DOCKET FILE COPY ORIGINAL

**If there are any problems with this transmission,
Please contact our office immediately at
(973) 916-1800**

Since 1985

1037 ROUTE 46 EAST, SUITE C-102 • CLIFTON, NJ 07013 • TEL 973-916-1800 • FAX 973-916-1886

Letter of Appeal
Federal Communications Commission
Office of the Secretary
January 7, 2005
Page 5

Adjustment Letters received by ICM. Again, while the plans are similar, they all appear to be based upon information and sample technology plans ("Sample Technology Plans") that were available on the E-Rate Central website (www.e-ratecentral.com). Attached to ICM's May 12, 2004 Appeal, as Enclosure D, was a copy of a technology plan that is the subject matter of this appeal and as Enclosure E a copy of Sample Technology Plans that was printed from the E-Rate Central website. While there are some differences in the technology plans, they are all substantially similar to each other and the Sample Technology Plans. While ICM has no knowledge concerning the preparation of the technology plan at issue in this appeal, it is clear that Dar Al-Hikmah Elementary School very likely accessed the E-Rate Central website and utilized the website as a basis for the preparation of its technology plan, as apparently did other applicants thereby yielding technology plans that are similar. To draw a conclusion that ICM, Diversified Computer Solutions, Inc., or any other party "was improperly involved in the competitive bidding process" from such circumstantial and unconvincing evidence is a harsh leap of faith that cannot be justified in this forfeiture case where the continued existence of ICM is at stake.

B. Although ICM was successful in convincing the Administrator that not only was it not "improperly involved with the competitive bidding process", and that alone should have been ample basis for rescinding the Commitment Adjustment Letter, the Administrator seems to ignore the reversal of this vital factual issue, and then denies the appeal based on evidence that was never considered in the prior appeal.

For the first time, in the Administrator's decision, it is indicated that the Administrator has reviewed "applicant documentation that was submitted to SLD during the course of the Item 25 Selective Review process". Not only did the original Commitment Adjustment Letter fail to mention this evidence, but again this was a process of which ICM had no connection with whatsoever, and had no knowledge concerning the documents that may have been filed or considered in connection with that review.

The fact that the Administrator considered this review and related documents without giving ICM notice of this new or additional evidence and a right to review it and comment or refute it, is an unconscionable violation of Due Process. "The Due Process Clause provides that certain substantive risks - - - life, liberty and property - - cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Board of Education v. Loudermill, et al.* 470 U.S. 532, 541 (1985). These procedures would include notice of the evidence and a right to be heard concerning that evidence. In this matter, the Administrator considered new or different evidence than was considered as the basis for issuing the Commitment Adjustment Letter, without notice to ICM or a right for ICM to contest that new evidence. This was a fundamental violation of ICM's right of Due Process. This Commission has held that "submission of new evidence following a funding commitment decision letter is permitted only



INDEPENDENT COMPUTER MAINTENANCE LLC

SALES • COMMUNICATIONS • CONSULTING • VOICE & DATA SOLUTIONS

www.icmcorporation.com

INDEPENDENT COMPUTER MAINTENANCE, LLC

1037 Route 46 East, Suite C102

Clifton, NJ 07013

January 7, 2005

By Fax: 202-418-0187

and Federal Express

Letter of Appeal

Federal Communications Commission

Office of the Secretary

445 - 12th Street, S.W.

Washington, DC 20554

RECEIVED & INSPECTED

JAN 10 2005

FCC - MAILROOM

REQUEST FOR REVIEW

Re: **APPEAL OF (1) COMMITMENT ADJUSTMENT LETTER
AND (2) SUBSEQUENT DENIAL OF SAID APPEAL BY
THE SCHOOLS AND LIBRARIES DIVISION OF THE
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY
CC DOCKET NO.: 02-6
FUNDING YEAR: 2002 Through 2003
FORM 471 APPLICATION NUMBER: 310459
APPLICANT NAME: Dar Al-Hikmah Elementary School
APPLICANT CONTACT: Louay Amil
BILLED ENTITY NAME: Dar Al-Hikmah Elementary School
BILLED ENTITY NUMBER: 208847
BILLED ENTITY AND APPLICANT
CONTACT PHONE NO. (973) 785-2300
SERVICE PROVIDER: Independent Computer Maintenance, LLC
SERVICE PROVIDER IDENTIFICATION NO.: 143026575
SERVICE PROVIDER CONTACT PERSON: Anthony Natoli
SERVICE PROVIDER CONTACT PHONE NO.: 973-916-1800
SERVICE PROVIDER FAX NO.: 973-916-1986
SERVICE PROVIDER E-MAIL:
TONYN@ICM CORPORATION.COM**

**Enclosure 1: Copy of Administrator's Decision on Appeal -
Funding Year 2002-2003 for Dar Al-Hikmah
Elementary School dated November 16, 2004.**

**Enclosure 2: Copy of Independent Computer Maintenance, LLC
Appeal of Commitment Adjustment -
Funding Year 2002-2003 for Dar Al-Hikmah
Elementary School dated May 12, 2004.**

Enclosure 3: Copy of FCC Decision entitled "In Re

Since 1985

1037 ROUTE 46 EAST, SUITE C-102 • CLIFTON, NJ 07013 • TEL 973-916-1800 • FAX 973-916-1986

"SLD found similarities in Forms 470 and Technology Plans among the applicants associated with this vendor. This indicates that the vendor was improperly involved in the competitive bidding process. As a result, the commitment amount is rescinded in full." (Emphasis added) (A copy of the March 16, 2004 Commitment Adjustment Letter is annexed as Enclosure A of Enclosure 2.)

On May 12, 2004, ICM submitted its Letter of Appeal with respect to the aforesaid Commitment Adjustment Letter citing a number of reasons why the proposed Commitment Adjustment was improper and wrong, including the fact that ICM had no contact with the applicant, Dar Al-Hikmah Elementary School, during the period the Form 470 and Technology Plan in question was prepared or filed. By letter dated November 16, 2004, the USAC issued an Administrator's Decision of Appeal - Funding Year 2002-2003, denying in full ICM's appeal.

The Administrator's Decision of Appeal - Funding Year 2002-2003 cites the following reasons for its rejection of ICM's appeal:

"It has been determined that the applicant documentation that was submitted to SLD during the course of the Item 25 Selective Review process indicates that similarities in the Form 470: 693490000396814 and technology plan exist. During the course of the appeal review, it was determined that the applicants' form identifier is the Form 470 number, standard services are sought for each service category, service or function and quantity and/or capacity is written in all capital letters. Upon review of the Item 25 documentation that was submitted by the applicant, it was determined that identical language exists for all six competitive questions, template fax back has identical wording in what appears to be the same handwriting, and the template technology plan has identical wording and format. Based upon this documentation, it was determined that similarities exist within the Form 470 and the technology plan which indicate that the original vendor, Diversified Computer Solutions, Inc., of the reference service requests was improperly involved in the competitive bidding process. Consequently, the appeal is denied in full." (Emphasis added)

While ICM was apparently successful in dispelling the reason USAC originally rescinded in full the FRNs, to wit, that ICM "was improperly involved in the competition bidding process," the Administrator only modified the original finding to find that there was an indication that the

prior vendor, not ICM, was "improperly involved in the competitive bidding process" and rejected ICM's appeal on that basis.

Notwithstanding the fact that ICM was apparently successful in convincing the Administrator that the critical fact USAC based its prior decision on was wrong and ICM was not improperly involved in the competitive bidding process, the damage to ICM of rescinding in full the FRNs remained intact. This determination by the Administrator must be reversed because 1) it was clearly arbitrary and capricious 2) it fails any test of adequate due process, 3) it was decided based upon assumption, consequential evidence and conjecture, and 4) it is not supported by any factual determinations as well as the fact that it violates the holding and directive of the FCC contained in *In re Federal-State Joint Board on Universal Service*, 19 FCC Rod 15252, adopted by the FCC on July 23, 2004. [hereinafter *In re Federal-State*]. On November 23, 2004, ICM requested the SLD to reconsider its decision based upon *In re Federal-State* holding.

ARGUMENTS

1. These determinations by the Universal Services Administrative Company ("USAC") were founded upon assumptions which had no basis in fact and were made in the absence of sufficient information. Since the bases of USAC's were founded on mere assumption, consequential evidence, and conjecture, the Administrator's Decision was arbitrary and capricious. In particular these determinations were wrong for the following reasons:

A. As stated in ICM's appeal of the Commitment Adjustment Letter dated May 12, 2004, ICM had obtained from the USAC website a copy of the Form 470 or had requested and received from Dar Al-Hikmah Elementary School, a copy of the Form 470 and technology plan that are at issue in this appeal. In addition, ICM had requested and received other Forms 470 and technical plans associated with other Form 470 Application Numbers being questioned by other Commitment Adjustment Letters. ICM compared the Form 470 and technology plan at issue in this appeal with other Form 470 and technology plans which are the subject matter of other Commitment Adjustment Letters received by ICM. A review of these Forms 470 indicated that the Form 470 is a standard form with a few spaces to be completed by the applicant. The form itself is obviously identical to all other Forms 470 and a detailed analysis of the applicant completed sections of the Form 470 at issue in this appeal versus the Forms 470 at issue in the other Commitment Adjustment Letters indicates that the Forms, while being similar, are certainly not identical in all respects. Furthermore, in all likelihood comparing these Forms 470 to any other Forms 470 would yield similar results.

With respect to the technology plans, ICM compared the technology plan at issue in this appeal with the other technology plans being questioned by other Commitment

Letter of Appeal
Federal Communications Commission
Office of the Secretary
January 7, 2005
Page 2

Federal-State Joint Board of Universal Service,
et al;” adopted on July 23, 2004.

Gentlemen:

NOTICE OF APPEAL

Please accept this letter and its enclosures as Independent Computer Maintenance, LLC's ("ICM") appeal of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") Administrator's Decision on Appeal - Funding Year 2002-2003, dated November 16, 2004. Said decision denied in full ICM's appeal of USAC's Commitment Adjustment Letter dated March 16, 2004, which letter rescinded in full the Funding Request Numbers ("FRNs") set forth below. A copy of USAC's Administrator's Decision on Appeal - Funding Year 2002-2003 dated November 16, 2004, is annexed hereto as Enclosure 1. A copy of ICM's Appeal to the USAC, and its enclosures, is annexed hereto as Enclosure 2.

FACTS

By a Commitment Adjustment Letter dated March 16, 2004, USAC advised ICM that, under the above-referenced Form Application Number, the commitment amount for the following FRN's are "rescinded in full" and requested the recovery of the funds to the extent indicated below:

<u>Funding Request Number ("FRN")</u>	<u>Requested Recovery</u>
807576	\$ 34,344.00
807620	\$132,606.00
807665	\$188,682.12
807708	- 0 -

The USAC's March 16, 2004 Commitment Adjustment decision was justified by USAC because: